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Supreme Court U.S.

No. 98-__ 98 861 OCT - 6 1998

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VERNON MILLER,

Petitioner,

—versus—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's employment of "the dominant purpose" language in *Hansen v. Haff*, 291 U.S. 559 (1934), *Mortensen v. United States*, 322 U.S. 369 (1944), *Cleveland v. United States*, 329 U.S. 14 (1946), and *Hawkins v. United States*, 358 U.S. 74 (1958), establishes the nexus requirement for a violation of the Mann Act, 18 U.S.C. § 2422 and 18 U.S.C. § 2423(a).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Vernon Miller respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit (Circuit Judges Feinberg and Walker and District Judge Shadur),[1] affirming a conviction entered in the United States District Court for the Southern District of New York on September 9, 1997, after a jury trial before the Honorable Jed S. Rakoff.

On April 16, 1997, Mr. Miller was convicted of coercing travel in interstate commerce for purposes of prostitution, in

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[1] Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

violation of 18 U.S.C. § 2422; and transportation of minors in interstate commerce for purposes of prostitution, in violation of 18 U.S.C. § 2423(a). Mr. Miller was sentenced to concurrent six-year terms of imprisonment. He has been incarcerated since the date of his arrest, February 26, 1996, and is presently imprisoned on the above charges.

The Court of Appeals affirmed Mr. Miller's conviction on July 10, 1998. As set forth more fully below, Petitioner respectfully suggests that the Court should grant a writ of certiorari to review the judgment and decision of the Court of Appeals, which conflicts with several decisions of this Court.

OPINION BELOW

The opinion of the Court of Appeals is reported at 148 F.3d 207, and is set forth in the Appendix (1a-16a).

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1998. The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At the time of the offense, section 2422 of Title 18, read as follows:

> Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not

more than five years, or both.[2]

Section 2423(a) of Title 18 reads as follows:

> Transportation with intent to engage in criminal sexual activity.—A person who knowingly transports any individual under the age of 18 years in interstate or foreign commerce, or in any Territory or Possession of the United States, with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than ten years, or both.

STATEMENT OF THE CASE

On February 26, 1996, Petitioner Vernon Miller was arrested by officers of the New York City Police Department and charged with various state crimes related to the same conduct at issue here. On March 26, 1996, the United States filed a complaint against Mr. Miller charging him with violations of the Mann Act, specifically, transporting in interstate commerce from Illinois to New York two minors for the purpose of those minors working as prostitutes, in violation of 18 U.S.C. § 2421[3]; coercing two minors to travel from Illinois to New York for the purpose of those minors working as prostitutes, in violation of 18 U.S.C. § 2422; and transporting two minors from Illinois to New York for the purpose of those minors working as prostitutes, in violation of 18 U.S.C. § 2423(a). (App. 13).[4] On that same day, an arrest warrant was issued for Mr. Miller, resulting in his transfer to federal custody. On June 11, 1996, the

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[2] After Mr. Miller's arrest, Section 2422 was amended. No substantive changes have been made to the applicable language.

[3] This count was dismissed prior to trial.

[4] References in the form "(App. __)" are to the Appendix to Appellant's Brief in the Court of Appeals.

Government filed a superseding indictment repeating these same charges. (App. 19). In the interim, the state charges against Mr. Miller were dismissed.

A. Background

The evidence at trial focused upon Mr. Miller's relationships with two young women he met in his neighborhood on the South Side of Chicago. One woman, his former fiancée, will be referred to as LK because of her age (16 at the time). The other woman, who was aged 15 at the time, will be referred to as MG.

Mr. Miller and LK met at a meeting of the gang known as the Latin Kings in approximately March 1995. (App. 245). LK, who was a member of a rival gang, attended the meeting hoping to become affiliated with the Latin Kings. (App. 245). Shortly thereafter, the two started dating, and they were later engaged. (App. 245-46; 290). MG also met Mr. Miller in March 1995, and the two became friends. (App. 66). Both women were deeply involved in street gang activity in Chicago with the Latin Kings and, with respect to LK, the Lady Eagle Nation, until the late summer of 1995, when Mr. Miller and LK announced at a meeting of the Latin Kings that they were quitting the gang. (App. 214-15; 313-15).

In September 1995, after MG ran away from an abusive father (App. 67), and LK ran away from home (App. 247), Mr. Miller, LK and MG began living together in a different neighborhood of Chicago called Stony Island. The evidence at trial showed that these three became involved in the massage business because of their dire financial straights. At the time, MG testified that the three were "broker than broke." (App. 75). Mr. Miller was unemployed. (App. 248). LK and MG worked at Dunkin' Donuts (App. 127; 248), then subsequently sought employment through a friend of Mr. Miller's, a woman named Sandi, who was a dancer and masseuse. (App. 251). LK

and MG initially discussed with Sandi the possibility of obtaining jobs as exotic dancers, but instead decided to work as masseuses. (App. 75; 162-63; 249).

While working for Sandi, MG or LK generally would be dispatched to appointments at the various Chicago hotels. Ordinarily, Mr. Miller would drive the women there and wait for them as security. The massages performed by MG and LK almost always culminated in masturbation of the customer. (App. 250-51). The women did not, however, perform any other sexual services for these customers. They were not "full service" prostitutes.

After a few weeks of this arrangement, LK, MG, and Mr. Miller resolved to establish their own body rub business, which they called Body Masseuse International, or BMI. (App. 165). At this same time, the three moved into a hotel in downtown Chicago. (App. 177; 197-98).

Two days after Christmas, LK learned that the Latin Kings had placed a "Terminate on Site" (or "TOS") order out for Mr. Miller, LK and MG calling for their murder because of their decision to end their association with the gang. (App. 316-18). LK learned this from her friend Opie, whom she saw when she returned to her neighborhood. (App. 302; 318). On January 6, 1996, Mr. Miller, his fiancée LK, and MG decided to leave Chicago and go to New York.

A few days before, just after the New Year, LK and MG had taken a trip to an ice-skating rink in Chicago, where they saw several members of the Latin Kings from their neighborhood. (App. 318-19). Mr. Miller, LK and MG voted and agreed to go to New York. (App. 221). However, MG and LK testified that when the time came to leave, each of them was reluctant to go if the other came along. (App. 100-02). Both women had sexual relations with Mr. Miller, which caused confrontations

amongst them. (App. 266). Nonetheless, MG came along with the engaged couple after telling Mr. Miller that she would not go home to her father. (App. 220). LK testified that she resisted going to New York, but that Mr. Miller insisted she come because they were "family." (App. 102).[5]

Accordingly, the three drove into one of the worst blizzards in the history of the East Coast, through highway closings, and white-out conditions. They passed flipped-over cars and trucks, on their way to a city where they knew no one and had no place to stay. (App. 120-23; 279; 299-300).

On January 8, 1996, the trio arrived in New York City. After a largely unsuccessful effort to run the BMI business in New York, LK and MG went to work at a brothel on 48th Street in Manhattan giving "body rubs," after a girlfriend of LK's had introduced the two women to the madame of that brothel, a woman named Martha. (App. 282-83). On February 26, 1996, after LK had a conversation with Martha, Martha called the authorities and informed them that LK and MG were working at her brothel. Shortly thereafter, Mr. Miller was arrested on the street outside the brothel. (App. 325, 333).

B. The Trial

The trial in this case commenced on April 14, 1997. The government's evidence consisted largely of testimony from LK and MG. The government asserted that Mr. Miller traveled with MG and LK from Chicago, Illinois to New York, New York in January 1996 for the purpose of establishing a prostitution business in New York, and that he had coerced the women to do

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[5] MG, LK and Mr. Miller also took a trip to Atlanta just before Christmas of 1995. (App. 262). However, they returned to Chicago after one week because there "wasn't enough money to open [BMI] in Atlanta." (App. 265).

so.

The defense did not contest the massage activities of the three in Chicago or in New York. However, it asserted that "the dominant motive" for the travel through the blizzard from Chicago to New York was not to promote prostitution, but rather to flee and avoid being murdered by the Latin Kings. In support of this point, the defense relied upon LK's admission of the facts surrounding the "TOS" issued by the Latin Kings calling for the murder of Mr. Miller, LK and MG. (App. 302; 316-18).

In his proposed instruction, Mr. Miller asked the district court to instruct the jury that, with respect to all counts charged in the indictment, "the government must prove beyond a reasonable doubt that *the dominant* purpose of the travel from one state to another was to have the persons transported engaged in prostitution." (Defendant's Proposed Jury Instruction No. 40) (App. 509) (emphasis added). The district court rejected this instruction, and instead instructed the jury that:

> the government must prove that it was part of the defendant's conscious purpose in transporting these minors across state lines to have one or both of them engage in prostitution or other criminal sexual conduct. It need not have been his only purpose or motivation, but it must have been more than merely incidental; it must have been *one of the dominant* purposes of the trip.

(App. 428) (emphasis added). On April 16, 1997, the jury returned guilty verdicts on both counts.

C. The Decision of the Court of Appeals

The Court of Appeals held that the district court had properly instructed the jury on the standard required to convict Mr. Miller of violating the Mann Act. In its opinion, the circuit

court primarily relied upon an earlier Second Circuit decision, *United States v. Sirois*, 87 F.3d 34, 39 (2d Cir.), *cert. denied*, 117 S. Ct. 328 (1996), which had interpreted 18 U.S.C. § 2251, a statute prohibiting sexual exploitation of children. (10a-11a). The Court of Appeals largely ignored Mr. Miller's argument that the controlling standard under the Mann Act is one first set forth in this Court's decision in *Hansen v. Haff*, 291 U.S. 559, 563-64 (1934), emphasized and explained in *Mortensen v. United States*, 322 U.S. 369 (1944), and utilized in *Hawkins v. United States*, 358 U.S. 74, 79 (1958), *Cleveland v. United States*, 329 U.S. 14, 20 (1946), as well as the Second Circuit's own decision in *United States v. McConney*, 329 F.2d 467 (2d Cir. 1964).

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S INSTRUCTION CONTRADICTED CONTROLLING SUPREME COURT PRECEDENT.

The Court of Appeals' decision to affirm Mr. Miller's conviction disregarded controlling Supreme Court precedent. The district court erred by failing to instruct the jury that Mr. Miller could only be found guilty of violating the Mann Act if "the dominant motive" of the interstate transportation was to have MG and LK engage in prostitution. Since Mr. Miller's defense was that *the dominant* purpose of the travel from Chicago to New York was the non-criminal goal of avoiding the Latin Kings' TOS on the three, the failure to give the charge to which the defense was entitled was clear error.

A. Mortensen Set Forth "The Dominant Motive" Language as the Standard Governing the Nexus Requirement in Mann Act Prosecutions

The district court's instruction contradicted the clear language of this Court's decision in *Mortensen v. United States*, 322 U.S. 369 (1944). In that case, this Court held that the Mann Act was violated only when "*the dominant* motive" of the interstate travel was to have the persons transported engage in prostitution or sexual conduct prohibited under the statute. *Mortensen*, 322 U.S. at 373-74 (emphasis added). The use of "the dominant motive" language in *Mortensen* was deliberate and intended to ensure that prosecutorial use of the Mann Act did not exceed its proper boundaries as intended by Congress.

In *Mortensen*, this Court considered whether a couple who ran a prostitution business in Nebraska were properly convicted under the Mann Act when they brought two prostitutes who worked for them along on a vacation to Utah. For purposes of deciding the case, the Court assumed that the defendants "anticipated that the two girls would resume their activities as prostitutes upon their return." *Id.* at 374. Nonetheless, the Court reversed their convictions for the failure to establish the required nexus between the interstate travel and the conduct prohibited under the statute:

> An intention that the women or girls shall engage in the conduct outlawed . . . must be found to exist before the conclusion of the interstate journey and must be *the dominant motive of such interstate movement*. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.

Id. (emphasis added).[6]

The use of "the dominant motive" test in *Mortensen* was clearly deliberate. In support of its holding, the Court relied upon its earlier decision in *Hansen v. Haff*, 291 U.S. 559, 563-64 (1934), which had directly considered the importance of the nexus requirement in holding that the Mann Act was not violated where a couple entered the United States for two reasons: to continue their illicit sexual relations (acts which indisputably would have violated the statute as it was then codified); and to return home to Los Angeles where the woman intended to continue her work as a domestic. The *Hansen* Court concluded that, even if the couple continued their illicit relations, the woman's "entry cannot be said to be with *the purpose only* that she live in a state of concubinage," thus, "[i]f *the purpose* of the journey is not sexual intercourse, *though that be contemplated*, the statute is not violated." *Id.* (internal quotation marks omitted and emphasis added). The Court explained the basis for its holding, stating:

> People not of good moral character like others, travel from place to place and change their residence. *But to say that, because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance.*

Id. (emphasis added) (*quoted in Mortensen*, 322 U.S. at 376).

"The dominant motive" language of *Mortensen* is crucial

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[6] *Mortensen* reversed convictions under the precursor to the current version of the Mann Act, which prohibited the knowing transportation in interstate commerce of "any woman or girl for the purpose of prostitution or debauchery . . . or with the intent and purpose to induce, entice, or compel such a woman or girl to become a prostitute." Act of June 25, 1910, § 2, 36 Stat. 825, 18 U.S.C. § 398 (later rescinded).

because it ensures that there be clear evidence of the nexus between the interstate travel and the prohibited conduct which justifies federal regulation of that conduct. As summarized by the First Circuit in *United States v. Sabatino*, 943 F.2d 94, 102 (1st Cir. 1991), the Mann Act was enacted in 1910 in response to growing Congressional concern for what many believed to be the common practice of commercial procurers taking young girls and women and forcing them into lives of prostitution. The Act was not aimed at regulating the practice of voluntary prostitution, responsibility for which remained the province of the States. *See id.* at 103 (citing H.R. Rep. No. 47, 61st Cong., 2d Sess. (1909)); *see also* S. Rep. No. 886, 61st Cong., 2d Sess., 10 (1909); *United States v. McConney*, 329 F.2d 467, 468 (2d Cir. 1964) ("The framers of the Mann Act intended to leave these problems to the states.").

By limiting convictions under the Mann Act to those where "the dominant motive" of the interstate travel was to engage in one of the purposes prohibited under the Mann Act, *Mortensen* gave effect to Congress' intent not to rise all prostitution to the level of a federal crime. As the Court in *Mortensen* noted, this limitation was important in preventing what many in Congress saw as the danger of the Mann Act:

> We do not here question or reconsider any previous construction placed on the Act which may have led the federal government into areas of regulation not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have a similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions 'are liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble,

without any corresponding benefits to society.'

Mortensen, 322 U.S. at 376-77 (quoting 45 Cong. Rec. 1033); *see also Hansen v. Haff*, 291 U.S. at 562-63. By instructing the jury that he could be convicted of Mann Act violations if the government demonstrated that the statutorily prohibited conduct was "one of the dominant purposes," the district court rendered meaningless and superfluous the word "dominant" and effectively overruled, *sub silentio*, the Supreme Court's decision in *Mortensen* and its progeny.

B. This Court's Holding Was Deliberate and Not Dicta

Petitioner recognizes that, in addition to the Second Circuit, other circuits, with the exception of the Third and the D.C. Circuits which have not yet ruled on this issue, have refused to give effect to "the dominant motive" standard set forth by this Court. *See, e.g., United States v. Ellis*, 935 F.2d 385, 389-90 (1st Cir.), *cert. denied*, 502 U.S. 869 (1991); *United States v. Campbell*, 49 F.3d 1079, 1082-83 (5th Cir.), *cert. denied*, 116 S. Ct. 201 (1995); *United States v. Vang*, 128 F.3d 1065, 1070-72 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1107 (1998); *United States v. Meacham*, 115 F.3d 1488, 1495 (10th Cir. 1997). In considering "the dominant motive" standard, these courts have typically either (1) construed this use of the word "dominant" to mean "compelling" or "important," *see, e.g., Forrest v. United States*, 363 F.2d 348, 349 (5th Cir. 1966), *cert. denied*, 386 U.S. 995 (1967) (same) ("one of efficient or compelling purposes"); *Dunn v. United States*, 190 F.2d 496, 497 (10th Cir. 1951); *United States v. Snow*, 507 F.2d 22, 23 (7th Cir. 1974) (same); or (2) argued that this Court's repeated use of the "the dominant motive" language in *Mortensen, Hansen, Hawkins* and *Cleveland* was merely dicta. *See, e.g., Vang*, 128 F.3d at 1071-71; *Dangle v. United States*, 181 F.2d 311, 314 (1st Cir. 1950).

Neither of these arguments has merit. Construing the word "dominant" to mean "compelling" or "important" defeats its plain meaning and renders its import meaningless. Dominant is defined as: "*most* influential," The Oxford English Dictionary 946 (2d ed. 1994) (emphasis added); "*most* prominent, as in position; ascendant," The American Heritage College Dictionary 410 (3d ed. 1993) (emphasis added); and "[c]ommanding, controlling or prevailing *over all others* . . . overlooking and commanding from a superior elevation." Webster's Ninth New Collegiate Dictionary 374 (9th ed. 1986) (emphasis added). The plain meaning of the word "dominant" thus dictates that, while an individual may have multiple motives for engaging in particular conduct, there can be only *one* dominant or paramount motive. Consequently, the district court's instruction — "one of the dominant" — invited confusion among the jurors, given its inconsistency with the plain meaning of the word "dominant."

Likewise, the suggestion that "the dominant purpose" requirement is dicta is incorrect. As discussed above, this Court set forth the requirement as the standard for determining whether a defendant had the requisite motivation in crossing state lines to be culpable under the Mann Act in recognition of its potential encroachment into areas traditionally regulated by the states. *See Mortensen*, 322 U.S. at 376-77. Moreover, later decisions of this Court followed *Mortensen*, limiting culpability under the Mann Act to those who traveled across state lines with "the dominant motive" of having the transported persons engage in the statutorily proscribed conduct. *See, e.g., Hawkins v. United States*, 358 U.S. 74, 79 (1958) ("the only factual issue in the case was whether petitioner's dominant purpose in making the trip was to facilitate her practice of prostitution"); *Cleveland v. United States*, 329 U.S. 14, 20 (1946) ("There was evidence . . . that the unlawful purpose was the dominant motive."). Such repeated affirmative employment

of "the dominant purpose" standard cannot justifiably be characterized as dicta.

In *Mortensen*, this Court employed "the dominant motive" language as the standard governing Mann Act prosecutions in reliance on *Hansen v. Haff*, 291 U.S. at 563-64, in which the use of "the dominant purpose" language was most certainly not dicta.[7] As discussed above, *Hansen* expressly concluded that the Mann Act's nexus requirement was not established where there was evidence of dual motives for traveling — one legitimate and one illicit — and where the government failed to show that the travel into the United States was "with *the purpose only* that [Hansen] live in a state of concubinage." *Id.* at 563 (emphasis added). *Hansen* further emphasized that "[i]f *the purpose* of the journey is not [the prohibited conduct], *though that be contemplated*, the statute is not violated." *Id.* at 563 (emphasis added).

The fact that this Court acted deliberately in *Hansen* is made perfectly clear by the dissent of Justice Butler, who recognized and voiced his disagreement with the standard established by the majority which made culpability under the Mann Act "depend[ent] on whether the immoral purpose is dominant or subordinate." *Hansen*, 291 U.S. at 496-97. Moreover, this Court recognized and followed the standard established by *Mortensen* in two subsequent decisions: *Hawkins*, 358 U.S. at 79 ("the only factual issue in this case was whether petitioner's *dominant purpose* in making the trip was to facilitate her practice of prostitution [emphasis added]"); and *Cleveland*, 329 U.S. at 20 ("The test laid down in the *Mortensen* case was whether the transportation was in fact 'the use of interstate

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[7] Courts have used the words "motive" and "purpose" interchangeably in employing this standard. *Compare Mortensen*, 322 U.S. at 374, *with Hansen*, 291 U.S. at 563.

commerce as a calculated means for effectuating sexual immorality' ... [and here] [t]here was evidence ... that *the unlawful purpose was the dominant motive* [emphasis added].").

That "the dominant purpose" language was used in *Mortensen* as a standard to be employed in Mann Act prosecutions is also made clear in *Hawkins*, when this Court stated:

> In *construing this Act*, we have *held*: 'The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing the unlawful purposes.... Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act.... What Congress has outlawed by the Mann Act is the use of interstate commerce as a calculated means for effectuating sexual immorality.'

358 U.S. at 81 n.6 (emphasis added) (citing *Mortensen,* 322 U.S. at 374-75).

Any attempt to summarily dismiss "the dominant purpose" standard in *Mortensen* and its progeny as dicta is unsupportable in light of the fact that that language was articulated to ensure that Mann Act prosecutions were contained within constitutional limits. As discussed above, "the dominant purpose" requirement of *Mortensen* was judicially imposed in order to keep the Mann Act within constitutional limits and congressional intent. *See Mortensen*, 322 U.S. at 376-77. As Professor Barbara Holden-Smith noted in her scholarly study,

> [t]he debate on the [Mann Act] centered primarily on the question of whether it was unconstitutional. The minority report of the Committee plainly rested its objection on the view that the bill was beyond Congress's constitutional authority.... Representative Richardson of Alabama devoted considerable time to advancing the proposition

that the legislation invaded the states' police powers....

Lynching, Federalism, and the Intersection of Race and Gender in the Progressive Era, 8 Yale J.L. & Feminism 31, 66 (1996); *see also* David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* 4 (1994) ("In enacting the Mann Act, Congress aimed at a very specific problem. Unfortunately, it used general language [in the statute]."). Accordingly, this Court should grant this writ of certiorari to prevent further erosion of its long-established standard.

Finally, the importance of giving effect to the plain meaning of "the dominant motive" requirement of *Mortensen* cannot be understated in the case against Mr. Miller. At trial, evidence was introduced to show *the dominant* purpose of Mr. Miller's travel to New York with LK and MG was non-criminal — to escape a "hit" by the Latin Kings. (App. 313-19). Properly instructed, the jury could have found that this was *the dominant* and innocuous motive of the interstate travel, and acquitted Mr. Miller.

CONCLUSION

For the reasons stated above, Petitioner Mr. Miller urges the Court to grant a writ of certiorari and set the case down for briefing and argument.

Respectfully Submitted,

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APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1997

Argued: May 13, 1998 Decided: July 10, 1998

Docket No. 97-1525

UNITED STATES OF AMERICA,

Appellee,

-against-

VERNON MILLER,

Defendant-Appellant.

Before:

FEINBERG and WALKER, Circuit Judges,
and SHADUR, District Judge.[1]

Appeal from judgment of conviction after jury trial entered in the United States District Court for the Southern District of New York (Jed S. Rakoff, J.), which convicted defendant for coercing travel, 18 U.S.C. § 2422, and transporting minors, 18 U.S.C. § 2423(a), in each case in interstate commerce and for the purpose of having the minors engage in prostitution or other criminal sexual activity. Held, where defendants allege multiple

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[1] Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

purposes for interstate travel, these statutes are violated if proscribed motivation was one of the dominant purposes for the travel.

Affirmed.

JOHN P. COONEY, JR., New York, NY (Eric F. Grossman, of Counsel), for *Defendant-Appellant*.

WILLIAM E. CRACO, New York, NY, Assistant United States Attorney for the Southern District of New York (Mary Jo White, United States Attorney for the Southern District of New York, Alexandra A.E. Shapiro, Assistant United States Attorney, of Counsel), for *Appellee*.

FEINBERG, Circuit Judge:

Vernon Miller appeals from his conviction, after a jury trial in the United States District Court for the Southern District of New York (Jed S. Rakoff, J.), for coercing travel, 18 U.S.C.§ 2422, and transporting minors, 18 U.S.C. § 2423(a), in each case in interstate commerce and for purposes of prostitution or other criminal sexual activity. Miller was sentenced principally to concurrent six-year prison terms on the two counts. Miller argues that the district court erred in instructing the jury that it could convict if it found that prostitution or illegal sexual activity was one of several "dominant purposes" for the travel. Miller also argues that the district court erred in refusing to suppress certain evidence. We find that the district court properly instructed the jury, and that even assuming for argument that the evidence was not properly admitted, any error was harmless. We affirm.

I. Background

A. The Criminal Conduct

Miller met the two minors involved in this case in March 1995 in his Chicago neighborhood, where all three were involved with the Latin Kings street gang. One of the girls, who due to her age and the nature of the case will be identified only as LK, was 16 years old at the time of the relevant events, while the other, who will be identified only as MG, was 15 years old. Miller was 34 years old. Miller began a sexual relationship with LK, and the two eventually became engaged. In September 1995, both LK and MG ran away from home. The three broke off from the Latin Kings and moved to a different Chicago neighborhood.

Miller had no job, and the two girls soon ended up working for a friend of Miller's providing massages that culminated with masturbation of the clients. The girls did not, however, provide other sexual services. The three soon established a similar business of their own under the name Body Masseuse International (BMI). Miller would drive the girls to the clients' hotels, and then wait outside in the car and collect the money earned by the girls. At various points during their relationship, Miller was violent towards both girls.

While working in Chicago, Miller and the girls discussed moving their business to other cities, including New York. Miller told the girls, however, that he was worried the authorities "would try to pin on him transporting minors across state lines." In December 1996, MG was arrested for prostitution. Upon her release, Miller told the girls that he feared the police knew of their operation. The three left for Atlanta the next day, but lacking the money to establish BMI there, they had to return to Chicago.

Towards the end of December 1996, after an argument with Miller, LK returned to her old neighborhood. While there, she spoke with friends who told her that the Latin Kings had issued "Terminate On Sight" orders for the three because they had severed their association with the gang. Miller managed to persuade LK to return the same day. Upon her return, he beat her and told her that because she had been seen in her old neighborhood, her parents or the police could track them down. He told her that they had to leave Chicago. Both girls told Miller that they did not want to go to New York, but Miller threatened LK that he would kill her if she did not go to New York because she would "tell everything" if she stayed. The next morning LK again refused to go to New York, and tried to leave the hotel without Miller. He chased her down and put her into his car. Miller allowed LK to phone her family, but held his fist to her head as she spoke and warned her not to tell her family "about the business or where they were going."

After driving through a severe blizzard, the three arrived in New York City. Miller arranged for pagers and BMI business cards printed with the pager numbers, and the three reestablished their operation. Shortly thereafter, LK and MG met a woman named Martha who ran a brothel. The girls began performing their services part-time at Martha's brothel. Miller would drive the girls to the brothel and continued to control the money they earned. Miller also continued to abuse the girls. For example, on several occasions MG performed full sexual intercourse at the brothel, because Miller had been complaining that she was not making enough and it paid more than the massage and masturbation service. Upon discovering that MG had engaged in "full-service" prostitution, Miller beat her and choked her into unconsciousness.

In late February 1996, LK refused to go to work at the

brothel. She told Miller that she was tired of supporting him. Miller grabbed LK by the hair, and began to hit and kick her. LK went to the brothel, and discussed her situation with Martha. Martha purchased an airline ticket back to Chicago for LK, who used it to return to her family that night.

That evening, Martha spoke with two New York City detectives from the Vice Enforcement Squad about MG and LK. The detectives then posed as brothel operators for a meeting with MG, and proposed that the girls work for them. MG relayed the proposal to Miller, who told her that he was interested. Late the same evening, one of the detectives (Margaret Martinez), still posing as a brothel operator, met with Miller. Miller told Martinez that he had someone on an outcall and was too busy to discuss the proposal but agreed to meet with Martinez the next day.

Miller was arrested upon leaving the brothel. MG was found the next day handing out BMI business cards at a downtown hotel. After his arrest, Miller admitted to the police that he had a massage business with the girls, but claimed that it did not involve prostitution. Before trial, Miller attempted to suppress this post-arrest admission, but the district court rules it admissible and Miller had not challenged that determination on appeal. Miller was charged with various state law crimes. In March 1996, Miller was charged in a federal indictment with violating 18 U.S.C. §§ 2422 and 2423(a).[2] (The state charges were later dropped). Those statutes currently provide, in relevant part, as follows:

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[2] The indictment also charged Miller with violating 18 U.S.C. § 2421, but the government later agreed to drop this charge.

§ 2422(a)[3]

> Whoever knowingly . . . coerces any individual to travel in interstate . . . commerce . . . to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined . . . or imprisoned not more than five years, or both.

§ 2423(a)

> A person who knowingly transports any individual under the age of 18 years in interstate . . . commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined . . . or imprisoned not more than then years, or both.

B. The Disputed Search and Evidentiary Rulings

After Miller's arrest, one of the girls told Detective Kevin Mannion that the property they had left at their hotel included a camera and film containing nude photographs of them taken by Miller. Mannion spoke with Mr. Lewis, the manager of the hotel, who informed him that the three had not paid their bill or returned for their property, and that their goods had been packed in bags and stored in a different room. On February 29, 1996, Mannion obtained a warrant to search for the camera and film in the rooms that the three had occupied and the room containing their property. Before the search, Lewis told Mannion that he intended to dispose of the property. Mannion located and

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[3] At the time of Miller's offense, § 2422 consisted only of what is now § 2422(a). No substantive changes to the applicable language were made in the amendment that added § 2422(b).

seized the camera in the last bag to be searched. In the process, Mannion also found and seized a bundle of BMI business cards, two beepers, a directory of hotels, and a cellular telephone. Although Lewis was the one who packed Miller's belongings into the bags, Mannion did not ask Lewis which bag contained the camera and film.

Prior to trial, Miller moved to suppress all of these items other than the camera and film, arguing that the search violated the Fourth Amendment. After an evidentiary hearing, Miller submitted an affirmation which stated that on February 27, 1996, the day after his arrest, he asked Lewis to pack up the items in their rooms and "store them safely for me," and that Lewis agreed to do so.

The district court (Barbara S. Jones, J.) denied Miller's motion. In February 1997, the court held that most of the items other than the camera and film were found in plain view during a lawful search. A month alter, the court held that as to other items, Miller had no standing to protest the search because he had no legitimate expectation of privacy in the hotel room in which the property had been stored. The judge relied upon various cases including United States v. Rahme, 813 F.2d 31 (2d Cir. 1987), in which this court stated that "[o]nce the hotel, in a position adverse to the guest, properly takes possession of . . . luggage, the guest no longer has the right to control access to it and can have no legitimate expectation of privacy in it." Id. at 35. The court noted that Miller neither paid for nor offered to pay for the storage of the goods, and that hotel employees had ready access to the room in which the property was stored. Miller argued that Lewis's agreement to store the property created a bailment, and that under United States v. Perea, 986 F.2d 633 (2d Cir. 1993), such a bailment does not terminate his legitimate expectation of privacy. The district

court held that *Perea* stood only for the proposition that "in the Fourth Amendment context, bailees can have sufficient interest in bailed property to give them standing to object to its seizure or search." Id. at 640 (citations omitted). The court noted that Lewis, the alleged bailee, had not challenged the search and in fact had told the police that he was preparing to dispose of the items left in the room.

C. The Disputed Jury Instructions

In February 1997, the case was transferred to Judge Rakoff for trial. Miller argued that the jury, in order to convict, had to find that *the* dominant purpose for the trip from Chicago to New York—rather than simply *a* dominant purpose—was to have the girls engage in prostitution or other criminal sexual conduct. For this proposition, Miller relied on Mortensen v. United States, 322 U.S. 369 (1944), which involved a precursor to the statutes under which Miller was charged. The district court rejected that argument, relying on United States v. Sirois, 87 F.3d 34 (2d Cir.), cert. denied, 117 S. Ct. 328 (1996). In *Sirois*, the defendant offered two motives for his transportation of minors, both of which were illegal, but only one of which was proscribed by the federal statute in question, 18 U.S.C. § 2251. This court held that the Supreme Court in *Mortensen* "had no occasion to decide whether an illegal purpose had to be exclusive or even paramount" because multiple motives were not involved in that case. The *Sirois* court held that a defendant may be convicted as long as the forbidden purpose was "one of the dominant motives" and "not merely an incident of the transportation." Sirois, 87 F.3d at 39. Guided by *Sirois*, Judge Rakoff instructed the jury that:

> the government must prove that it was part of the defendant's conscious purpose in transporting these

> minors across state lines to have one or both of them engage in prostitution or other criminal sexual conduct. It need not have been his only purpose or motivation, but it must have been more than merely incidental; it must have been one of the dominant purposes of the trip.

The jury found Miller guilty of violating both § 2422 and § 2423(a). This appeal followed.

II. Discussion

A. The Disputed Jury Instructions

1. Standard of Review

Miller's primary argument on appeal is that the district court incorrectly instructed the jury as to the applicable law. We review *de novo* whether the district court accurately stated the law. United States v. Malespo, 115 F.3d 155, 166 (2d Cir. 1997). Miller bears "the burden of showing that his requested charge accurately represented the law in every respect and that, viewing as a whole the charge actually given, he was prejudiced." United States v. Ouimette, 798 F.2d 47, 49 (2d Cir. 1986).

2. Arguments of the Parties

On appeal, Miller renews his argument that under *Mortenson*, prostitution or other criminal sexual activity must be "*the* dominant purpose" of the interstate travel rather than only "*one* of the dominant purposes," as the judge charged. He relies on dictionary definitions of "dominant" to establish that while a defendant can have many motives, there can only be one "dominant" motive. See e.g., The Oxford English Dictionary 946 (2d ed. 1994) (defining dominant as "*most* influential")

(emphasis added). Miller agrees that use of "dominant" in *Mortensen* cannot be dismissed as dicta because this court adopted that standard in United States v. McConney, 329 F.2d 467, 469 (2d Cir. 1964), because Hansen v. Haff, 291 U.S. 559, 562-63 (1934), which was relied on by *Mortensen*, involved multiple motives, and because "the dominant purpose" language was repeated in subsequent cases. See e.g., Hawkins v. United States, 358 U.S. 74, 79 (1958); Cleveland v. United States, 329 U.S. 14, 20 (1946). He argues that the dominant purpose requirement was created to ensure an adequate basis for federal jurisdiction and to reflect Congressional concern about encroaching on the states' jurisdiction over prostitution-related crimes.

As for *Sirois*, Miller contends that the case failed to address our prior decision in *McConney*, and is distinguishable because the defendant in *Sirois* was charged under a child-pornography statute which, unlike the statute interpreted in *Mortensen*, was motivated by a Congressional finding that the large majority of states did not have laws to deal with the problem. Furthermore, Miller notes that the alleged dominant purpose proffered by the defendant in *Sirois* was itself illegal, whereas in this case his dominant purpose in traveling to New York was to escape the threat of the Latin Kings. Finally, Miller argues that the rule of lenity requires that any doubts as to the reach of the statutes be resolved in his favor.

In response, the government points out that Miller's argument is not supported by the actual text of the statutes, which make no reference to a "dominant" purpose. It argues that this court did not adopt Miller's interpretation of the *Mortensen* standard in *McConney*, and has since held in *Sirois* that the reference to a "dominant" purpose in *Mortensen* was dicta because in that case "the Court was careful to point out that the *only* purpose of

the . . . trip was to enjoy a vacation." Sirois, 87 F.3d at 39. The government emphasizes that every other circuit that has considered this issue has rejected the interpretation suggested by Miller. See e.g., United States v. Vang, 128 F.3d 1065, 1072 (7th Cir. 1997), cert. denied, 118 S.Ct. 1107 (1998); United States v. Meacham, 115 F.3d 1488, 1495 (10th Cir. 1997); United States v. Cambell, 49 F.3d 1079, 1082-83 (5th Cir. 1995); United States v. Ellis, 935 F.2d 385, 389-90 (1st Cir. 1991). The government rejects Miller's appeal to the rule of lenity, arguing that the statutory text clearly proscribes the conduct engaged in by Miller. Finally, it argues that even if the instruction were incorrect, Miller cannot demonstrate any prejudice in light of the overwhelming evidence that Miller was not motivated by the threat of the Latin Kings when he took the girls to New York. For example, the trip to Atlanta took place immediately after MG was arrested for prostitution but before the threat.

3. Discussion

We conclude that Miller cannot avoid our holding in *Sirois*, as well as the holding of every circuit that has considered and rejected the interpretation he offers. It is true that *Sirois* involved a different statute, but the *Sirois* panel interpreted the very language from *Mortensen* on which Miller relies and reached a conclusion directly contrary to the one he would have us adopt. Miller also argues that *Sirois* did not specifically address other cases that use "the dominant purpose" language, such as *McConney*. However, *McConney* did not involve multiple purposes. In that case, we found that there was insufficient evidence to establish that the defendant was even aware, much less intended, that his wife was going to engage in prostitution at the conclusion of their journey. Likewise, the Supreme Court cases that Miller cites do not support his

position. *Hansen* involved a mistress who was simply returning home from a trip abroad with her married paramour. *Hansen* was clearly a case in which any immoral purpose was purely incidental, and this is reflected in the language from that case quoted in *Mortensen*, which stated "[p]eople not of good moral character, like others, travel from place to place and change their residence. But to say that, because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance." Mortensen, 322 U.S. at 376 (quoting Hansen, 291 U.S. at 562-63).

Moreover, we think that Miller over-simplifies the meaning of "dominant." He is correct that the word has a connotation of exclusive supremacy. But we do not think his interpretation of the term is the only reasonable one. If Miller's restrictive interpretation of "dominant" were correct the word could never be applied to a group, because it would incorrectly lump together one "dominant" member of that group with other members who — at least by Miller's definition — would actually be "non-dominant." But in everyday speech we can and do describe groups as "dominant." For example, it makes perfect sense to discuss the "dominant companies" in an industry or the "dominant teams" in a league, and all we mean by describing these companies or teams as "dominant" is that they are relatively more successful or influential than others. Likewise, in the context of multiple purposes, "dominant" simply means that these motivations predominate over other, less powerful motivations for conduct. See e.g., Forrest v. United States, 363 F.2d 348, 349 (5th Cir. 1966) (referring to "one of the dominant purposes" or the "efficient and compelling purposes" in the mind of the accused); Dunn v. United States, 190 F.2d 496, 497-98 (10th Cir. 1951) (same); United States v.

Snow, 507 F.2d 22, 23-24 (7th Cir. 1974) (government must prove "a dominant purpose") (then-Circuit Judge Stevens) (emphasis in original). In short, we find no error in the judge's charge here to the jury on this issue.

B. The Disputed Search and Evidentiary Rulings

1. Standard of Review

Miller also argues that the district court erred in denying his motion to suppress the items found during Mannion's search. In reviewing this contention, we view the evidence in the light most favorable to the government. This district court's factual findings are reviewed for clear error, and its legal conclusions are subject to *de novo* review. United States v. Peterson, 100 F.3d 7, 11 (2d Cir. 1996).

2. Arguments of the Parties

In order to have standing to challenge the search of the items left at the hotel, Miller must demonstrate "(a) that he had an expectation of privacy that society is prepared to recognize as reasonable, and (b) that he had conducted himself and dealt with the property in a way that indicated a subjective expectation of privacy." Perea, 986 F.2d at 639.

Miller argues that the district court erred in relying on *Rahme* to establish that he had no standing to challenge the search, because here (unlike in R*ahme*) Lewis agreed to store his property. The district court noted that Miller did not offer to pay for such storage. But Miller argues that *United States v. Fields*, which held that a non-paying guest had a legitimate expectation of privacy, makes it clear that such expectation does not necessarily hinge on payment. 113 F.3d 313, 320 (2d Cir.), cert. denied, 118 S.Ct. 434 (1997). The district court also noted that hotel employees had access to the room in which Miller's

property was stored, but Miller points out that hotel employees have access to all rooms, and such access does not preclude a finding that he had a reasonable expectation of privacy in the stored goods. Stoner v. California, 376 U.S. 483, 489-90 (1964) (hotel guests have standing under Fourth Amendment notwithstanding "implied or express permission to such persons as maids, janitors or repairmen to enter [their] room in the performance of their duties") (internal quotation marks omitted). Miller argues that even if Lewis was preparing to dispose of the items, Lewis's agreement to safeguard the items gave Miller a reasonable expectation of privacy in the items.

On the merits of the search, Miller notes that Mannion could have asked Lewis to identify the bag containing the camera and film, which would have limited the scope of the search to the items mentioned in the warrant. Miller argues that the plain view doctrine is not applicable because that doctrine "may not be used to extend a general exploratory search from one object to another until an incriminating item turns up." United States v. George, 975 F.2d 72, 80 (2d Cir. 1992). He argues that his failure to dispute that he ran a massage business with the girls at trial does not render any error harmless because the district court's decision to admit the disputed evidence necessarily shaped his trial strategy.

The government responds that the facts in this case are comparable to those in *Rahme*. It argues that Lewis's agreement to store Miller's belongings is not sufficient to establish Miller's standing. Lewis did not agree that others would be excluded from access to the property, Miller did not specify how the property would be stored, and MG and LK would have had access to the property in any event. As to the merits of the search, the government argues that Mannion was lawfully searching for the camera and film, and simply did not find those

items until he came to the last bag. Finally, the government argues that even if the motion to suppress should have been granted, any error was harmless beyond a reasonable doubt. United States v. Lasanta, 978 F.2d 1300, 1306 (2d Cir. 1992) (applying harmless error doctrine to Fourth Amendment search and seizure claim). The government notes that Miller never contested running the massage business in New York.

3. Discussion

The issue whether Miller had standing to challenge the search is a close one. While the reasoning in *Rahme* makes good sense, this case involves several complicating factors not present in that case. The government has not disputed that Lewis agreed to store Miller's property. Therefore, it is arguable that at least for some length of time, Miller had an expectation of privacy in the goods that society might consider reasonable whether or not payment was involved. Lewis's statement that he was getting ready to dispose of the goods further complicates matters. We need not decide the standing issue, however, and we therefore express no opinion upon it. Even assuming for argument that Miller had standing and that the business cards, cell phone, beepers, and hotel directories should not have been admitted, the government is correct that any error was harmless beyond a reasonable doubt. The items seized during the search establish only that Miller and the girls ran a massage business. Notwithstanding Miller's suggestion that he would have disputed the existence of the massage business but for the admission of the disputed materials, the existence of BMI was established by overwhelming evidence, including the testimony of MG and LK, Miller's tape-recorded statement to Martinez that he had a girl on an outcall, Miller's post-arrest admission that he ran a massage business with the girls and the fact that when MG was found after Miller's arrest,

she was handing out BMI business cards at a downtown hotel.

We have considered all of Miller's arguments and find that they do not require a reversal here. For the reasons stated above, we affirm the judgment of the district court.